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REPORT
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INDIAN GAMING REGULATORY ACT

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Mr. INOUYE, from the Select Committee on Indian Affairs, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 555]

The Select Committee on Indian Affairs, to which was referred the bill (S. 555) to regulate gaming on Indian lands, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

PURPOSE

S. 555 provides for a system for joint regulation by tribes and the Federal Government of class II gaming on Indian lands and a system for compacts between tribes and States for regulation of class III gaming. The bill establishes a National Indian Gaming Commission as an independent agency within the Department of the Interior. The Commission will have a regulatory role for class II gaming and an oversight role with respect to class III.

BACKGROUND

S. 555 is the outgrowth of several years of discussions and negotiations between gaming tribes, States, the gaming industry, the administration, and the Congress, in an attempt to formulate a system for regulating gaming on Indian lands. In developing the legislation, the issue has been how best to preserve the right of

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tribes to self-government while, at the same time, to protect both the tribes and the gaming public from unscrupulous persons. An additional objective inherent in any government regulatory scheme is to achieve a fair balancing of competitive economic interests.

The need for Federal and/or State regulation of gaming, in addition to, or instead of, tribal regulation, has been expressed by various State and Federal law enforcement officials out of fear that Indian bingo and other gambling enterprises may become targets for infiltration by criminal elements. While some States have attempted to assert jurisdiction over tribal bingo games, tribes have very strenuously resisted these attempts. It was this conflict which gave rise to the *California* v. *Cabazon Band of Mission Indians* case *(Cabazon)*, decided by the Supreme Court on February 25, 1987. (480 U.S. ____, 94 L.Ed.2d 244, 1987). The Court, using a balancing test between Federal, State, and tribal interests, found that tribes, in States that otherwise allow gaming, have a right to conduct gaming activities on Indian lands unhindered by State regulation. This decision followed a long line of cases that began with the case of *Seminole* v. *Butterworth,* (658 F.2d 3110, 5th Cir., 1982, cert. denied 1982).

The Seminole Tribe of Florida in 1979 was the first tribe to enter the bingo industry. A court challenge by the State of Florida led the Fifth Circuit Court of Appeals to decide, in the *Seminole* case, that the tribe could conduct gaming free from State interference, primarily because the Federal Government had never transferred jurisdiction to the State of Florida to impose its civil laws on Indian lands.

Since Florida is a Public Law 280 state,[1] the Court applied a civil regulatory/criminal prohibitory test to determine the extent of state authority over tribal activities. The *Seminole* court found that Florida's laws governing bingo are civil regulatory, not criminal prohibitory. Therefore, if Florida's laws governing bingo had been found to be criminal prohibitory in nature, they would have applied to the Seminole Tribe. But pursuant to the application of Public Law 280, the State's civil regulatory laws governing bingo were found not to apply to the Seminole Tribe's bingo operations.

Since the Seminole Tribe opened its game and succeeded in court, over 100 bingo games have been started on Indian lands in states where bingo is otherwise legal. As established in testimony presented to the Committee, it was determined that collectively, these games generate more than $100 million in annual revenues to tribes. Indian tribal elected officials demonstrated to the Committee that bingo revenues have enabled tribes, like lotteries and other games have done for State and local governments, to provide a wider range of government services to tribal citizens and reservation residents than would otherwise have been possible. For various reasons, not all tribes can engage in profitable gaming operations. However, for those tribes that have entered into the busi-

[1] Public Law 83-280, codified in 18 U.S.C. 1162 and 28 U.S.C. 1360, authorized the transfer of criminal jurisdiction over Indians and Indian lands from the Federal Government to those state governments that chose to assert such jurisdiction. Tribes were free to continue to exercise civil jurisdiction over their members and their lands. The law was subsequently amended in 1968 to require tribal consent before jurisdiction could be transferred to a State. Since then, no tribes have done so and no new states are permitted to come under the Public Law 280 statute.

ness of business, the income often means the difference between an adequate governmental program and a skeletal program that is totally dependent on Federal funding.

In deciding the *Cabazon* case, the Supreme Court used a balancing test, weighing the interests of States, tribes and the Federal Government. The Court relied heavily on the fact that the Department of the Interior, as trustee for Indian tribes, reviews tribal gaming ordinances and approves or disapproves them, as well as all joint venture and management contracts with outside firms. The court also emphasized the Federal Government's interest in Indian self-government, including the goal of encouraging tribal self-sufficiency and economic development.

However, in the final analysis, it is the responsibility of the Congress, consistent with its plenary power over Indian affairs, to balance competing policy interests and to adjust, where appropriate, the jurisdictional framework for regulation of gaming on Indian lands. S. 555 recognizes primary tribal jurisdiction over bingo and card parlor operations although oversight and certain other powers are vested in a federally established National Indian Gaming Commission. For class III casino, parimutuel and slot machine gaming, the bill authorizes tribal governments and State governments to enter into tribal-State compacts to address regulatory and jurisdictional issues.

Development of Legislation.—Congressional consideration of Indian gaming legislation began in the 98th Congress with the introduction of several bills and the conduct of hearings. No further action, however, was taken by either the Senate or the House. In the 99th Congress, five bills were introduced in the House to provide a Federal role in the oversight of gaming on Indian lands. Congressman Morris Udall's bill, H.R. 1920, emerged as the primary vehicle for the Indian gaming legislation, and the House Interior Committee held three hearings on the H.R. 1920. The administration had no legislative proposal of its own to offer at that time. In November 1985, representatives of the Department of the Interior and the Department of Justice testified in support of tribal bingo, regulated by a Federal agency, but in opposition to class III gaming unless conducted under State jurisdiction.

Over the course of the development of the legislation, the definition of class I has remained constant but class II and class III definitions have been subject to much debate. Class I is the term consistently used to describe traditional gaming conducted at Indian pow-wows and ceremonies, gaming activities which are entirely free of outside regulation or oversight. Under S. 555, class II is the term used for bingo, lotto, some types of card games, as well as other forms of bingo-type gaming such as pull-tabs, punch cards, tip jars, and the like. Class III is all other forms of gaming—slot machines, casino games including banking card games, horse and dog racing, pari-mutuel, jai-alai, and so forth.

The bill reported to the House floor in April 1986 allowed the proposed National Indian Gaming Commission and the tribes to regulate both class II and III gaming. Class III gaming would have been regulated in accordance with State rules and regulations governing such gaming. However, no jurisdiction over Indian lands was conferred on States. A compromise bill (H.R. 1920) passed the

House on April 21, 1986, calling for a 5-year moratorium on any new class III tribal gaming and a GAO study to determine the best regulatory scheme for class III gaming on Indian lands.

On April 29, 1986, the Supreme Court docketed the *Cabazon* case, significantly altering the course of the legislation as it was referred to the Senate. (The Court actually granted certiorari on June 10, 1986.) Tribes, concerned that the Court's ruling might adversely affect their position on the legislation, became more willing to compromise. Other parties, believing the Court would rule in favor of State regulation, became more adamant about furthering the position in favor of transferring jurisdiction over Indian gaming activities to the States. Despite significant compromises made by tribes, the Senate failed to pass H.R. 1920 before the adjournment of the 99th Congress.

The Senate Indian Affairs Committee reported an amended version of H.R. 1920 to the Senate on September 15, 1986. The revised committee bill affirmatively recognized tribal jurisdiction over class I and class II gaming but provided an additional Federal regulatory system for class II activities. The bill prohibited class III gaming. Tribes generally opposed any effort by the Congress to unilaterally confer jurisdiction over gaming activities on Indian lands to States and voiced a preference for an outright ban of class III games to any direct grant of jurisdiction to States. The Senate bill reflected the tribal position, but left the option open to tribes to come under State jurisdiction if they chose to engage in Class III gaming.

The major provisions of the bill required tribes to adopt ordinances governing gaming operations and a newly established Federal gaming commission to approve such ordinances before a game could be licensed. It provided a detailed system for the investigation and regulation of non-Indian investors and managers. It also established a system for civil and criminal penalties, including closure authority, to assure compliance with the act.

Subsequent to reporting the bill, and in further response to administration and State concerns, additional changes were recommended by the Chairman of the Indian Affairs Committee. However, despite efforts to negotiate changes that were acceptable to certain parties, the bill was not considered by the Senate prior to adjournment of the 99th Congress.

LEGISLATIVE HISTORY—100TH CONGRESS

Senators Inouye, Evans, and Daschle introduced S. 555 on February 19, 1987, just 6 days prior to the decision in *Cabazon*. The bill was based in large part on the Senate version of H.R. 1920 that was pending at the end of the 99th Congress. S. 1303 was introduced on June 2, 1988, by Senators McCain, Inouye, and Evans, and reflected certain changes based on the *Cabazon* decision. Senators Hecht and Reid introduced S. 1841 on November 4, 1987.

In the House, Representatives Udall and Bereuter introduced H.R. 1079 on February 10, 1987; Representatives Coelho, Lujan, and Pepper introduced H.R. 964 on February 4, 1987, and Representatives Udall, Young (Alaska), Campbell, Smith (Florida), and Bereuter introduced H.R. 2507 on May 21, 1987. H.R. 3605 (identi-

cal to S. 1841) was introduced by Representatives Vucanovich and Bilbray on November 3, 1987. S. 1303 and H.R. 2507 were identical bills when introduced and H.R. 2507 became the House legislative vehicle for Indian gaming.

On June 18, 1987, the Select Committee on Indian Affairs held a hearing on both S. 555 and S. 1303.

STATEMENT OF POLICY

The regulation of gaming activities on Indian lands has been the subject of much controversy. Representatives of States with experience in regulating some forms of gaming activities, such as Nevada and California, have expressed concern over the potential for the infiltration of organized crime or criminal elements in Indian gaming activities. The criminal division of the U.S. Department of Justice has expressed similar concerns, although as stated in the additional views of Senator John McCain, in 15 years of gaming activity on Indian reservations, there has never been one clearly proven case of organized criminal activity.

Recognizing that the extension of State jurisdiction on Indian lands has traditionally been inimical to Indian interests, some have suggested the creation of a Federal regulatory agency to regulate class II and class III gaming activities on Indian lands. Justice Department officials were opposed to this approach, arguing that the expertise to regulate gaming activities and to enforce laws related to gaming could be found in state agencies, and thus that there was no need to duplicate those mechanisms on a Federal level.

It is a long- and well-established principle of Federal-Indian law as expressed in the United States Constitution, reflected in Federal statutes, and articulated in decisions of the Supreme Court, that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands. In modern times, even when Congress has enacted laws to allow a limited application of State law on Indian lands, the Congress has required the consent of tribal governments before State jurisdiction can be extended to tribal lands.

In determining what patterns of jurisdiction and regulation should govern the conduct of gaming activities on Indian lands, the Committee has sought to preserve the principles which have guided the evolution of Federal-Indian law for over 150 years. In so doing, the Committee has attempted to balance the need for sound enforcement of gaming laws and regulations, with the strong Federal interest in preserving the sovereign rights of tribal governments to regulate activities and enforce laws on Indian land. The Committee recognizes and affirms the principle that by virtue of their original tribal sovereignty, tribes reserved certain rights when entering into treaties with the United States, and that today, tribal governments retain all rights that were not expressly relinquished.

Consistent with these principles, the Committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unitaterally impose or

allow State jurisdiction on Indian lands for the regulation of Indian gaming activities.

The mechanism for facilitating the unusal relationship in which a tribe might affirmatively seek the extension of State jurisdiction and the application of state laws to activities conducted on Indian land is a tribal-State compact. In no instance, does S. 555 contemplate the extension of State jurisdiction or the application of State laws for any other purpose. Further, it is the Committee's intention that to the extent tribal governments elect to relinquish rights in a tribal-State compact that they might have otherwise reserved, the relinquishment of such rights shall be specific to the tribe so making the election, and shall not be construed to extend to other tribes, or as a general abrogation of other reserved rights or of tribal sovereignty.

It is also true that S. 555 does not contemplate and does not provide for the conduct of class III gaming activities on Indian lands in the absense of a tribal-State compact. In adopting this position, the Committee has carefully considered the law enforcement concerns of tribal and State governments, as well as those of the Federal Government, and the need to fashion a means by which differing public policies of these respective governmental entities can be accommodated and reconciled. This legislation is intended to provide a means by which tribal and State governments can realize their unique and individual governmental objectives, while at the same time, work together to develop a regulatory and jurisdictional pattern that will foster a consistency and uniformity in the manner in which laws regulating the conduct of gaming activities are applied.

S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed.

Finally, the Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in *Cabazon*. Under Public Law 83–280, the prohibitory/regulatory distinction is used to determine the extent to which State laws apply through the assertion of State court jurisdiction on Indian lands in Public Law 280 States. The Committee wishes to make clear that, under S. 555, application of the prohibitory/regulatory distinction is markedly different from the application of the distinction in the context of Public Law 83–280. Here, the courts will consider the distinction between a State's civil and criminal laws tc determine whether a body of law is applicable, as a matter of Federal law, to either allow or prohibit certain activities. The Committee does not intend for S. 555 to be used in any way to subject Indian tribes or their members who engage in class II games to the criminal jurisdiction of States in which criminal laws prohibit class II games.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Select Committee on Indian Affairs, in open business session on May 13, 1988, by unanimous vote and with a quorum present, recommends that the Senate pass S. 555, with an amendment in the nature of a substitute.

HIGHLIGHTS—INDIAN GAMING REGULATORY ACT

Class I (ceremonial gaming).—Traditional gaming remains within the exclusive jurisdiction of Indian tribes and outside the scope of the Act.

Class II (bingo, lotto, pull tabs, tip jars, punch boards and card games, with the specific exclusion of banking card games such as chemin de fer, baccarat and blackjack).—Class II continues to be within tribal jurisdiction but will be subject to oversight regulation by the National Indian Gaming Commission; care games must be played under state-mandated hour and pot limits, if any.

Class III (all gaming that is not class I or class II, i.e., banking cards, all slot machines, casinos, horse and dog racing, jai-alai).—Tribes may engage in class III gaming if they enter into tribal-State compacts for the operation of tribal class III games.

Grandfather of existing banking card games.—(1) All card games operated by tribes on or before May 1, 1988 that would otherwise be considered as Class III game under the bill will be treated as Class II games; (2) individually owned class II games licensed by tribes will also be grandfathered. No new class III banking card games will be permitted to be regulated as class II games.

Grace period.—All video machines and other electronic or electromechanical facsimiles of games of chance may continue to operate for 1 year after the date of enactment of the bill to give tribes the opportunity to negotiate tribal-State compacts to cover the operation of such games.

Commission.—The National Indian Gaming Commission will be composed of five (5) persons, three (3) of whom must be members of federally recognized tribes; chairman will be appointed by the President with advice and consent of Senate, and the Department of Justice will conduct background investigations of all appointees.

Commission powers.—The Commission will have authority to: permanently close tribal games; enforce collection of civil fines; enforce tribal gaming ordinances; monitor all Indian gaming activities; inspect faming premises; conduct background investigations of employees and contractors; access records, books and other documents and audit accounts; conduct any investigation necessary in connection with regulation of class II gaming; consult with law enforcement officials where appropriate; and request the U.S. Attorney General to conduct necessary criminal investigations.

Commission funding.—Operating costs of up to $3 million per year derived from tribal assessments (50 percent) and congressional appropriations (50 percent). Assessments set on a sliding fee scale from ½ percent to 2½ percent of first $1,500,000 of gross revenues and up to five (5) percent of amounts in excess thereof; gross revenue is all income less prize money paid, if any, and capital expenditures.

Tribal gaming ordinances.—Required for the operation of a class II or class III game; must be approved by the Commission; tribe must be the sole owner of the gaming enterprise; revenues can be used for tribal government operations, general tribal welfare (including per capitas that are subject to Federal income tax), economic development, and charity; for class II, tribe must have system for conducting background checks on key managers and employees and must license such officials; tribes may also license an individual or entity to conduct gaming within the limits of applicable state law.

Management contracts.—Permitted for fees up to 30 percent of net revenues with exceptions of up to 40 percent; Commission must investigate contractors and may disapprove a contract based on such investigation; contract must allow tribal access to daily operations of the game, monthly audits, minimum guaranteed payment to the tribe, and have terms of no more than five (5) years, with exceptions up to seven (7) years.

Review of existing ordinances and contracts.—Commission must notify each gaming tribe of the review process and the tribe must forward existing contracts and ordinances within 60 days; Commission has 90 days to review ordinances and, if such ordinances conform to the act, they are approved; if not, the tribe is notified of needed changes and will have 120 days to comply; for contracts, the Commission has 180 days to review and if they meet the requirements of the act, they are approved; if not, the parties have 120 days to comply (except those contracts previously approved by the Secretary have 180 days to comply).

Civil penalties.—$25,000 fine for violation of any provision of the act; Commission has the power to close a game or to cancel a contract but must notify the tribe first of an intent to fine, close or cancel; appeals are provided for.

Concurrent jurisdiction.—Tribes may exercise existing tribal governmental authority under tribal law over any gaming.

Judicial review.—All decisions of the Commission are final agency decisions for purposes of appeal to Federal district court.

Subpoena.—Commission may subpoena witnesses and documents and depose any person as part of its investigative powers.

New lands.—Gaming on newly acquired tribal lands outside of reservations is not generally permitted unless the Secretary determines that gaming would be in the tribe's best interest and would not be detrimental to the local community and the Governor of the affected State concurs in that determination.

Criminal penalties.—For theft from Indian gaming activities penalties will range from $100,000 fine and 1 year in prison to $1,000,000 fine and 20 years in prison.

EXPLANATION OF MAJOR PROVISIONS

Definitions.—Class I gaming is defined in section 4(7). The Committee was hesitant to attempt to define traditional or ceremonial gaming as it is clearly an area of tribal self-government. However, the necessity of classifying all types of gaming requires the mention of this form of gaming and the Committee's intent is to make

certain that such gaming is never considered either as class II or class III.

Class II gaming is defined in section 4(8)(A)(B)(C) and (D) Consistent with tribal rights that were recognized and affirmed in the *Cabazon* decision, the Committee intends in section 4(8)(A)(i) that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development. The Committee specifically rejects any inference that tribes should restrict class II games to existing games sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibilty. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.

Section (4)(8)(A) also makes clear the Committee's intent that pull-tabs, punch boards, tip jars, instant bingo and similar subgames may be played as integral parts of bingo enterprises regulated by the act and, as opposed to free standing enterprises of these sub-games, state regulatory laws are not applicable to such subgames, just as they are not applicable to Indian bingo.

Section (4)(8)(A)(ii) provides that certain card games are regulated as class II games, with the rest being set apart and defined as class III games under section 4(9) and regulated pursuant to section 11(d). The distinction is between those games where players play against each other rather than the house and those games where players play against the house and the house acts as banker. The former games, such as those conducted by the Cabazon Band of Mission Indians, are also referred to as non-banking games, and are subject to the class II regulatory provisions pursuant to section 11(a)(2). Subparagraphs (I) and (II) are to be read in conjunction with sections 11(a)(2) and (b)(1)(A) to determine which particular card games are within the scope of class II. No additional restrictions are intended by these subparagraphs. The Committee notes that, while existing law does not require that Indian card games conform with State law, it agreed to adoption of bill language to provide that these card games be operated in conformity with laws of statewide application with respect to hours or periods of operation, or limitations on wagers or pot sizes for such card games.

Subparagraph 4(8)(B) specifically excludes from class II, and thus from regulation by a tribe and the National Indian Gaming Com-

mission, so-called banking card games and slot machines. The Committee's intent in this instance is to acknowledge the important difference in regulation that such games and machines require and to acknowledge that a tribal-State compact for regulation of such games is preferable to Commission regulation.

Subparagraph 4(8)(C) provides that card games actually operated by tribes in certain states on or before May 1, 1988, will continue to operate under tribal/Commission jurisdiction as class II games with the caveat that the games may not change their character, i.e., new or different kinds of games may not be substituted for the games that are grandfathered and the games must be played with the same pot and wager limits as currently operated. It is not the Committee's intention, however, to restrict these grandfathered games to a specific number of chairs, tables, or other similar conditions of operation. These are factors that are determined by the marketplace; games may contract or expand. All class II games are subject to the provisions of section 11(b) and (c). The Committee is cognizant of the fact that many of these games have been operating under tribal regulation free of Federal control for many years and are, in fact, crime free. While the Committee recognizes that this situation could be repeated on Indian lands in many states where such gaming is allowed, it also recognizes the State interest in participating in the regulation of such gaming. To come within the grandfather clause, the Committee intends to include all games in which an investment was made and the games were actually operated on or before May 1, 1988. Games are often closed temporarily for a variety of reasons, such as contract disputes, renovations, and collateral legal disputes, among others. Such closures are not meant to preclude a tribe's game from being included in this section. For this reason, the Committee specifically intends that the card room operated by the Lummi tribe in Washington State be included in this grandfather provision.

Section 4(8)(D) provides a 1-year grace period for the continued operation of any class III machine games or other facsimile games legally operated by tribes on Indian lands on or before May 1, 1988. This transition year is provided to enable tribes to enter into compacts for currently operated games such as video bingo, bingolet, bingo 21, and other similar games. The Committee is aware that the legality of these games are, in some cases, the subject of current litigation. The Committee has no opinion on the legality of such games and leaves that question to the courts where the merits can be decided on a case-by-case basis depending on relevant law. The grace period is simply intended to give those tribes that are currently operating those games which will become class III games upon enactment of this bill, the full spectrum of time envisioned in the compact process under 11(d) in which to conclude a compact with the State. This timeframe includes a 6-month negotiation period and, if negotiations should fail during that period, time to bring a court action. If the court finds for the tribe, it may order another 60-day negotiation period, and, if that fails, there must be time for the mediator and the Secretary of the Interior to respond in accordance with the directives of the act. While the entire process may take more than a year, the Committee believes it is important to bring some finality to the operation of class III games

unless they operate under a tribal-State compact. This grace period is contingent on the tribe requesting, within 30 days of enactment of the bill, that the state enter into negotiations leading to a compact to govern the continued operation of such games. If the tribe fails to make a request within the 30 day period, the Committee intends that games which are classified as class III will require closing of the games unless and until a compact is negotiated at some future date. The Committee specifically intends that this grace period cover the gaming operations of the Menominee tribe of Indians of Wisconsin.

Class III gaming is defined in section 4(9) as all gaming that is not included as class I or class II. All class III gaming will be subject to the terms and conditions of Tribal-State compacts agreed to under section 11(d).

Full-time Commissioners.—Section 5(b) provides that the five Commission members shall serve on a full-time basis. Under the bill the Commission's principle responsibilities are with class II gaming and it will participate only minimally in the regulation of class III gaming. The Committee retained the full-time service provision on the premise that, at least for the initial start-up phase of the Commission, such full-time service will be required. However, the Committee notes that section 7(c) requires the Commission to submit a report to Congress on December 31, 1989, that will include recommendations on whether Commissioners should serve full or part time.

Transition.—Section 10 of the bill requires the Secretary of the Interior to continue to exercise his trust responsibility for Indian tribes in supervising gaming activities on Indian lands until the Commission is fully functioning.

Jurisdiction.—Class I.—Section 11(a)(1) provides that traditional or ceremonial Indian gaming remains within the exclusive jurisdiction of Indian tribes and is not subject to any regulation pursuant to the act. Indian tribes engage in traditional gaming activities such as the "stick" or "bone" games that are played by tribes in conjunction with ceremonies, pow wows, feasts or other celebrations. These activities are not covered by this legislation. Similarly, where rodeos, horse races, or other kinds of gaming with purses or prizes, have traditionally been held in conjunction with such activities for members and guests, including publicly invited guests, such games are not to be considered class II or class III gaming for purposes of this legislation.

Class II.—Section 11(a)(2) stipulates that class II gaming remains within tribal jurisdiction but is subject to the provisions of the act where two conditions are met: The State within which the tribe is located must permit such gaming for any purpose by any entity; and such gaming is not otherwise prohibited by Federal law. The Committee recognizes that tribal jurisdiction over class II gaming has not been previously addressed by Federal statute and thus there has heretofore been no divestment or transfer of such inherent tribal governmental powers by the Congress.

There are five States (Arkansas, Hawaii, Indiana, Mississippi, and Utah) that criminally prohibit any type of gaming, including bingo. S. 555 bars any tribe within those States, as a matter of Federal law, from operating bingo or any other type of gaming. In the

other 45 States, some forms of bingo are permitted and tribes with Indian lands in those States are free to operate bingo on Indian lands, subject to the regulatory scheme set forth in the bill. The card games regulated as class II gaming are permitted by far fewer States and are subject to requirements set forth in section 4(8). The phrase "for any purpose by any person, organization or entity" makes no distinction between State laws that allow class II gaming for charitable, commercial, or governmental purposes, or the nature of the entity conducting the gaming. If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming.

The phrase "not otherwise prohibited by Federal Law" refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175. That section prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo and lotto. It is the Committee's intent that with the passage of this act, no other Federal statute, such as those listed below, will preclude the use of otherwise legal devices used solely in aid of or in conjuction with bingo or lotto or other such gaming on or off Indian lands. The Committee specifically notes the following sections in connection with this paragraph: 18 U.S.C. section 13, 371, 1084, 1303–1307, 1952–1955 and 1961–1968; 39 U.S.C. 3005; and except as noted above,m 15 U.S.C. 1171–1178. However, it is the intention of the Committee that nothing in the provision of this section or in this act will supersede any specific restriction or specific grant of Federal authority or jurisdiction to a State which may be encompassed in another Federal statute, including the Rhode Island Claims Settlement Act (Act of September 30, 1978, 92 Stat. 813; P.L. 95–395) and the Marine Indian Claim Settlement Act (Act of October 10, 1980; 94 Stat. 1785; P.L. 96–420).

Individually owned class II games.—Section 11(b)(4)(A) and (B) deal with the issue of individually owned and operated class II bingo and card games. It is the Committee's intent that all gaming, other than tribally owned gaming, on Indian lands be operated under State law. The Committee views tribal gaming as governmental gaming, the purpose of which is to raise tribal revenues for member services. In contrast, while income may accrue to a tribe through taxation or other assessments on an individually owned bingo or card game, the purpose of an individually-owned enterprise is profit to the individual owner(s) of Indian trust lands. While a tribe should license such enterprises as part of its governmental function, the Committee has determind that State law (such as purpose, entity, pot limits, hours or operation, etc.) should apply to such enterprises. These games are not to be confused with units of a tribe or tribal social or charitable organizations that operate gaming to support their charitable purposes; such games are not covered by this paragraph but rather will come under tribal gaming. Those individual games operated prior to September 1, 1986, may continue to operate under tribal ordinance and without regard to State purpose or hour and pot limits if such games provide 60 percent of net revenues to the tribe and the owner pays as assessment to the Commission under 18(a)(1). The date of September 1, 1986, was incorporated in the final Senate version of H.R. 1920 in the 99th Congress and all individuals were thus on notice

on that date that individually owned games would not likely be permitted in any final legislation adopted by the Congress.

Class III—tribal-State compacts.—Section 11(d) encompasses provisions relating to tribal-State compacts that will govern the operation of class III gaming on Indian lands. After lengthy hearings, negotiations and discussions, the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises such as parimutuel horse and dog racing, casino gaming, jai alai and so forth. The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few exceptions, such laws and regulations do not now apply. The Committee balanced these concerns against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands. The Committee concluded that the compact process is a viable mechanism for setting various matters between two equal sovereigns. The Statre of Nevada and the Fort Mojave Indian tribe negotiated a compact to govern future casino gaming on the Nevada portion of the tribe's reservation. While that compact itself may not be an appropriate model for other compacts, the issues addressed by the compact are the same issues that the Committee considers may be the subject of negotiations between other States and tribes.

In the Committee's view, both State and tribal governments have significant governmental interests in the conduct of class III gaming. States and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe and States. This is a strong and serious presumption that must provide the framework for negotiations. A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens. It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes.

The practical problem in formulating statutory language to accomplish the desired result is the need to provide some incentive for States to negotiate with tribes in good faith because tribes will be unable to enter into such gaming unless a compact is in place. That incentive for the States had proved elusive. Nevertheless, the Committee notes that there is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gaming currently in place. Thus a logical choice is to make use of existing State regulatory systems,

although the adoption of State law is not tantamount to an accession to State jurisdiction. The use of State regulatory systems can be accomplished through negotiated compacts but this is not to say that tribal governments can have no role to play in regulation of class III gaming—many can and will.

The terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and State, etc. Section 11(d)(3)(C) describes the issues that may be the subject of negotiations between a tribe and a State in reaching a compact. The Committee recognizes that subparts of each of the broad areas may be more inclusive. For example, licensing issues under clause vi may include agreements on days and hours of operation, wage and pot limits, types of wagers, and size and capacity of the proposed facility. A compact may allocate most or all of the jurisdictional responsibility to the tribe, to the State or to any variation in between. The Committee does not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands.

The Committee does view the concession to any implicit tribal agreement to the application of State law for class III gaming as unique and does not consider such agreement to be precedent for any other incursion of State law onto Indian lands. Gaming by its very nature is a unique form of economic enterprise and the Committee is strongly opposed to the application of the jurisdictional elections authorized by this bill to any other economic or regulatory issue that may arise between tribes and States in the future.

Finally, the bill allows States to consider negative impacts on existing gaming activities. That is not to say that the bill would allow States to reject Indian gaming on the mere showing that Indian gaming will compete with non-Indian games. Rather, States must show that economic consequences will be severe and that they will clearly outweigh positive economic consequences.

Burden of proof.—Section 11(d)(7) grants a tribe the right to sue a State if compact negotiations are not concluded. This section is the result of the Committee balancing the interests and rights of tribes to engage in gaming against the interests of States in regulating such gaming. Under this act, Indian tribes will be required to give up any legal right they may now have to engage in class III gaming if: (1) they choose to forgo gaming rather than to opt for a compact that may involve State jurisdiction; or (2) they opt for a compact and, for whatever reason, a compact is not successfully negotiated. In contrast, States are not required to forgo any State governmental rights to engage in or regulate class III gaming except whatever they may voluntarily cede to a tribe under a compact. Thus, given this unequal balance, the issue before the Committee was how best to encourage States to deal fairly with tribes as sovereign governments. The Committee elected, as the least offensive option, to grant tribes the right to sue a State if a compact is not negotiated and chose to apply the good faith standard as the legal barometer for the State's dealings with tribes in class III gaming negotiations. While a tribe must show a prima facie case, after doing so the burden will shift to the State to prove that it did act in good faith. The Committee notes that it is States not tribes, that have crucial information in their possession that will prove or

disprove tribal allegations of failure to act in good faith. Furthermore, the bill provides that the court, in making its determination, may consider any of the number of issues listed in this section, including the State's public interest and other claims. The Committee recognizes that this may include issues of a very general nature and, and course, trusts that courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes.

Management contracts.—As used in section 12 and throughout the bill, the term "managment contract" refers to agreements governing the overall management and operation of an Indian gaming facility by an entity other than the tribe or its employees. The term "management contract" does not include contracts or agreements for the procurement of particular services, materials or supplies. These service or supply agreements, including the supply of gaming aids such as pulltabs, computers, punch boards, and communications or other equipment, are subject to regulation under section 11(b)(2)(D). Charges associated with such services, materials, supplies or equipment are to be included as part of the total operating expenses in determining the net revenues under section 4(10).

Some concern has been expressed that the bill requires that existing management contracts be made consistent with the provisions of the bill that limit contract terms to 5 years and fee percentages to 30 percent (see sections 12(b)(5) and 12(c) and 13(c)). Compacts may, of course, provide for additional renewal terms. The Committee believes that the plenary power of Congress over Indian affairs, and the extensive government regulation of gambling, provides authority to insist that certain minimum standards be met by non-Indians when dealing with Indians. The Secretary's powers with respect to Indians are always subject to alteration or change by the Congress. In the area of gaming where many factors other than ordinary business risk enter into the equation, the Committee has no reluctance in requiring changes to existing gambling enterprise contracts, whether or not such contracts have been given a stamp of approval by the Secretary. Some of the contracts, approved or not, have been shown to be clearly unconscionable, and the members of the Committee believe that term of years and fee percentages set forth in the bill are adequate to protect any legitimate potential investor.

SECTION BY SECTION ANALYSIS

Section 1.—Title.—"Indian Gaming Regulatory Act".

Sec. 2.—Findings.—Congress finds that tribes engage in games which generate revenues; Federal law provides no clear standards for regulating Indian gaming; the goal of Federl policy is to promote tribal economic development and, in States where gaming is otherwise legal, tribes have the right to regulate gaming on Indian lands.

Sec. 3.—Declaration of Policy.—The purpose of the act is to provide a statutory basis for operating Indian gaming to promote economic development, to shield tribes from organized crime, to assure

fairness to operators and players, and to establish a Federal regulatory authority for Indian gaming to meet congressional concerns.

Sec. 4.—Definitions.—

(1) Attorney General (U.S. Attorney General)

(2) Chairman (of National Indian Gaming Commission)

(3) Commission (National Indian Gaming Commission)

(4) Indian lands (reservation lands and lands held in trust)

(5) Indian tribe (federally recognized)

(6) gaming (to deal, etc., any banking or percentage game of chance for money or other value)

(7) class I gaming (social, traditional games in connection with tribal ceremonies or celebrations)

(8) class II gaming (bingo, lotto, pull-tabs, punch boards, tip jars, card games authorized or not prohibited by State law and played in conformity with statewide regulations, if any, regarding times of operation and wager and pot limits; excludes baccarat, chemin de fer, blackjack, and all slot machines or electromechanical facsimiles of any game of chance; grandfathers certain card games as class II and gives 1-year grace period to other games that are classified as class III)

(9) class III gaming (all gaming that is not class I or class II)

(10) net revenues (gross revenues, less amount paid for prizes, if any, and operating expenses except management fees)

(11) Secretary (of the Department of the Interior)

Sec. 5(a).—Establishes National Indian Gaming Commission.

(b)(1) Commission shall have 5 full-time members, the chairman appointed by the President with the advice and consent of the Senate and the remainder by the Secretary of the Interior.

(2) Requires Justice Department to conduct background checks on persons considered for appointment and requires the Secretary to publish any pertinent information in the Federal Register.

(3) Prohibits appointment of more than three members from some political party and requires that at least three be members of federally recognized tribes.

(4) Sets staggered terms of appointments for initial terms.

(5) Prohibits appointment of convicted felon, or of anyone with any interst in any gaming activity or management contract.

(6) Sets criteria for removal from office for cause.

(c) Provides for filling vacancies.

(d) Provides that a quorum shall be three members.

(e) Provides for election of vice chairman.

(f) Requires Commission to meet at call of Chair but at least three times a year.

(g)(1) Sets rate of pay for Chairman.

(2) Sets rate of pay for other Commission members.

(3) Requires that Commissioners be reimbursed for travel and other expenses.

Sec. 6(a).—Empowers the Chairman to—

(1) issue temporary closure orders

(2) levy civil fines

(3) approve tribal gaming ordinances

(4) approve management contracts

(b) Grants Chairman such other powers as the Commission may delegate.

Sec. 7(a).—Delineates exclusive power of Commission to—
(1) approve the annual budget
(2) adopt regulations for civil fines
(3) adopt annual assessments
(4) authorize Chairman to issue subpoenas
(5) permanently close a gaming activity
(b) Delineates other powers of the Commission to—
(1) monitor gaming activities
(2) inspect gaming premises
(3) conduct background investigations
(4) demand access to records related to gaming
(5) use U.S. mails
(6) procure supplies
(7) enter into contracts
(8) hold hearings
(9) administer oaths
(10) promulgate rules and regulations
(c) Requires biannual report to Congress

Sec. 8(a).—Provides for appointment and rate of pay of general counsel.

(b) Provides for appointment of other staff and for rates of pay.

(c) Provides for procurement of temporary staff.

(d) Provides for detail of other Federal personnel to assist the Commission.

(e) Requires the GSA to provides administrative support services to the Commission.

Sec. 9.—Grants Commission right to information from other agencies of government.

Sec. 10.—Requires Secretary to exercise continuing authority over Indian gaming until Commission is in place.

Sec. 11(a)(1).—Provides that class I gaming is within the exclusive jurisdiction of Indian tribes and not subject to this Act.

(2) Provides that class II gaming is within Indian tribal jurisdiction but subject to the provisions of this act.

(b)(1) Permits class II gaming on Indian lands if the gaming is located in a State that allows the gaming for any purpose by any person or entity, and if the tribal governing body adopts an ordinance approved under this act. Requires a tribal license for each facility or location where class II gaming is conducted.

(2) Requires the Chairman to approve an ordinance if the tribe has the sole proprietary interest and if net revenues ar used for government operations, general welfare, economic development, charity, or funding local government agencies and if the gaming is audited and conducted in safe environment and if procurements over $25,000 are audited and if there is an adequate system for background checks on management and key employees, including tribal licensing of management and employees.

(3) Sets forth conditions for per capita payments of revenues and makes same subject to Federal tax.

(4) Sets forth conditions for tribal licensing of other non-tribal games on Indian lands and subjects same to standards comparable to that of State. Also provides for continued operation of individually owned/operated games operating on September 1, 1986 under certain conditions.

(c)(1) Permits Commission to consult with other law enforcement agencies and to notify tribes of objections to issuance of licenses.

(2) Provides for suspension and revocation of licensing after issued

(d)(1) Provides that class III gaming is lawful only when authorized by an approved tribal ordinance, located in a State that permits such gaming, and conducted in conformance with a tribal-State compact.

(2)(A) Requires that any tribe proposing to engage in or authorize any entity to engage in class III gaming activity must first present an ordinance to the Chairman that meets the requirements of subsection (b).

(B) Sets forth the conditions under which the Chairman shall approve a tribal class III gaming ordinance and requires publication of the ordinance in the Federal Register.

(C) Provides that class II gaming activity on tribes lands shall be subject to the terms and conditions of a tribal-State compact entered into under paragraph (3).

(D) Provides that a tribe may adopt an ordinance revoking any prior class III gaming ordinance but that any class III gaming activity may continue to operate for a 1-year period following publication of the revocation ordinance.

(3)(A) Requires that any Indian tribe planning to engage in class III gaming must request the State to enter negotiations for a tribal-state compact.

(B) Provides that a compact shall take effect when notice of approval by the Secretary of such a compact has been published in the Federal Register.

(C) Provides that a compact may include provisions relating to: application of tribe or State criminal and civil laws directly related to gaming; allocation of jurisdiction between the tribe and State; State assessments to defray any actual costs of regulation; tribal taxation; remedies; operating and licensing standards; and other subjects directly related to gaming operations.

(4) Clarifies that this bill does not confer on any state any authority to tax or otherwise assess any Indian Tribe.

(5) Provides that tribes continue to have the right to regulate class III gaming providing such regulation is consistent with the terms of a tribal-State compact.

(6) Waives application of 18 U.S.C. 1175 (which makes certain gambling devices illegal on Indian lands) when a tribe engages in class III gaming in a State where such devices are legal and a compact is in place.

(7)(A) Grants United States district courts jurisdiction over actions by: A tribe against a State for failure to enter into negotiations or to negotiate in good faith; a tribe or state to enjoin illegal gaming on Indian lands; and by the Secretary to enforce procedures prescribed in (7)(B).

(B) Authorizes a tribe to bring a suit 6 months after asking the State to enter in a compact upon evidence by the tribe that a compact has not been entered into; provides that when a tribe shows that the State did not respond or did not respond in good faith, then the burden of proof is on the State to show good faith negotiations; if the court finds for the tribe, it will order a 60-day negotia-

tion period and may take into account public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, but any demand by a state that it tax a tribe will be evidence of lack of good faith negotiation; if a compact is not concluded in 60 days, a court-appointed mediator will select from the last best offers submitted by the tribe and State which shall be submitted to the tribe and state and if the State consents, the compact goes into effect; if not, the mediator will notify the Secretary who will then prescribe procedures for the conduct of class III gaming on the land of the Indian tribe.

(8)(A) Authorizes the Secretary to approve any tribal-State compact governing gaming on Indian lands of an Indian tribe.

(B) Provides that the Secretary may disapprove a compact only if the compact violates the act, any other Federal law that does not relate to jurisdiction over gaming on Indian lands, or the trust obligation of the United States to Indians.

(C) Provides that if the Secretary does not approve the compact within 45 days, the compact shall be considered approved to the extent it is consistent with this act.

(D) Requires the Secretary to publish notice of approval of any tribal-State compact in the Federal Register.

(9) Requires the Commissioner to approve, under section 12, any management contract with respect to a class III gaming activity.

(e) Requires the Chairman to approve an ordinance within 90 days of its submission or it will be deemed approved to the extent it is consistent with the act.

Sec. 12(a).—Provides that tribes may enter into management contracts subject to approval of Chairman on the basis of background checks.

(b) Sets forth standards of contracts that must be met to receive approval, including a maximum term of 5 years or, on tribal request, 7 years.

(c) Allows approval of fees based on percentage of net revenues up to 30 percent or, in tribal request, 40 percent.

(d) Sets timelines for Chairman's approval of a contract.

(e) Prohibits Chairman from approving contracts if any person having an interest in the game is a tribal elected official, is a convicted felon, is a violator of this act, is a nefarious person with known criminal associations, or for other good and valid causes.

(f) Authorizes Chairman to require contract modifications or to void contract if its provisions are violated.

(g) Prohibits a contract from conveying real property.

(h) Transfers Secretary's authority to approve contracts to the Commission.

(i) Permits Commission to require contractor to cover costs of investigation under (e).

Sec. 13(a).—Requires the Chairman to notify tribes engaged in class II gaming to submit existing authorizing documents and existing management contracts for review and approval or disapproval.

(b) Provides guidelines for Chairman to determine whether the authorizing ordinance conforms to 11(b) and guidelines for tribal modification.

(c) Provides guidelines for Chairman to determine whether the contract in 13(a) conforms to section 12 and guidelines for tribal modification.

Sec. 14(a).—Sets guidelines for Chairman to levy and collect civil finds for violation of this Act or any tribal regulations approved by the Commission.

(b) Authorizes Chairman to order a temporary closure of a class II facility with a right to a hearing before the Commission.

(c) Provides appeal to Federal district court from fines levied and from permanent closure orders.

(d) Provides for tribal jurisdiction over gaming that is not inconsistent with this act.

Sec. 15.—Provides that certain Commission decisions will be final agency decisions for purposes of court review.

Sec. 16(a)–(f).—Provides guidelines for subpoena, deposition, payment of witnesses, and venue.

Sec. 17(a)–(c).—Provides for confidentiality of Commission findings, for disbursement of information and authorizes the Attorney General to investigate laws that apply to Indian lands.

Sec. 18(a).—Provides that Commission will assess games on a sliding fee scale from one-half of 1 percent percent to 2½ percent up to $1,500,000 of gross and up to 5 percent of amounts over $1,500,000; caps the total amount that may be assessed at $1,500,000; requires the Commission to adopt a fee schedule; provides that failure to pay will be grounds for revocation of Commission approval of license, ordinance, or resolution; provides that surplus funds in excess of costs of operating Commission be credited on pro rata bases to tribe for next year; defines gross revenues as total money wagered, less prize money and amortization of certain capital expenditures.

(b) Requires the Commission to adopt an annual budget and to seek appropriations to cover one-half the costs of operating the Commission.

Sec. 19(a).—Authorizes appropriations to carry out section 18.

(b) Authorizes $2 million for the first fiscal year.

Sec. 20(a)–(d).—Sets forth policies with respect to lands acquired in trust after enactment of this act and applies the Internal Revenue Code to winnings from Indian gaming operations.

Sec. 21.—Removes restrictions on use of mails and advertising with respect to gaming activities.

Sec. 22.—Severability.

Sec. 23.—Makes clear that gaming on Indian lands in the State of Rhode Island must be conducted in accordance with State law.

Sec. 24.—Codifies criminal penalties for illegal gaming in Indian country and for theft from Indian gaming establishments.

Sec. 25.—Conforming amendment.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate of S. 555, as amended, as evaluated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 17, 1988.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the attached cost estimate for S. 555, the Indian Gaming Regulatory Act.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JAMES L. BLUM,
Acting Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 555.
2. Bill title: Indian Gaming Regulatory Act.
3. Bill status: As ordered reported by the Senate Select Committee on Indian Affairs, May 13, 1988.
4. Bill purpose: This bill establishes the National Indian Gaming Commission within the Department of the Interior, and sets out the organization of the commission as well as its powers and duties in regulating gaming on Indian lands. The bill defines three classes of Indian gaming, giving the commission regulatory authority over class II gaming and the states, with commission oversight, authority to regulate class III gaming.

S. 555 authorizes the appropriation of up to $2 million for the operation of the commission in the first fiscal year after enactment. The bill also requires the collection of annual fees from each tribal gaming activity to support the commission; these fees would be supplemented by annual appropriations authorized in the bill.

5. Estimated cost of the Federal Government:

(By fiscal year, in millions of dollars)

	1989	1990	1991	1992	1993
Estimated authorization level	2	3	3	3	3
Estimated outlays	2	3	3	3	3

The costs of this bill would fall within budget function 450.

Basis of Estimate: The bill specifies that the commission shall receive at least one-half of its funding through assessments on gross gaming revenues, with the remaining funding to be appropriated. Gross gaming revenues are defined as total amounts wagered less payouts and amortization of capital expenditures for structures. The bill requires the assessment to be between 0.5 percent and 2.5 percent for the first $750,000 of gross revenues, and no more than 5 percent for amounts greater than this level. Based on Bureau of Indian Affairs estimates of annual gross revenues of $250 million to $300 million, annual assessments are estimated to be between $2 million and $3 million.

This implies a maximum annual commission budget of $6 million, up to $3 million of which may be appropriated.

The estimate assumes that gross revenues remain constant over time. Any changes in gross revenues would affect the level of fees and could therefore affect the commission's request for appropriations.

6. Estimated cost to state and local governments: Because this bill would give states new regulatory authority over gaming on Indian lands, states that permit class III gaming could experience some increased regulatory costs. However, based on information from the National Association of Gaming Regulatory Authorities and the Nevada Gaming Commission, most states would collect fees or reimbursements for their regulatory activities. Thus, the net cost impact of this legislation on states is not expected to be significant.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Carol Cohen.

10. Estimate approved by: C.G. Nuckols (for James L. Blum, Assistant Director for Budget Analysis).

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 555, as amended will have a minimal impact on regulatory or paperwork requirements.

EXECUTIVE COMMUNICATIONS

The Committee received the following letter the U.S. Department of Justice giving the Administration's views on S. 555.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, January 14, 1988.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs, Washington, DC.

DEAR MR. CHAIRMAN: During the June 18, 1987 hearing before the Committee concerning Indian gaming, the Department of Justice promised to provide a more complete analysis of S. 1303 than that presented in our prepared statement. This letter will describe our objections to that bill and will also comment tangentially on certain features of the other bill on this subject, S. 555.

GENERAL CONSIDERATIONS

As background for our views, we take the position that any legislation in the area of Indian gaming should have two overriding goals. First, such legislation should provide a set of "bright line" rules that set out the extent to which State gambling laws, both regulatory and prohibitory, apply in Indian country and provide that such rules apply in all States containing Indian country, not just in P.L. 280 States. After all, as the Court stated in Part II of

the *Cabazon* opinion, Congress can expressly provide that certain State laws apply to Indians in Indian country, as it did in enacting P.L. 280, and even in the absence of express congressional action the numerous Supreme Court cases dealing with Indian law "have not established an inflexible per se rule precluding state jurisdiction over tribes and tribal members [even] in the absence of express congressional consent." (Slip op., p. 11.) Second, as indicated in our prepared statement on S. 1303 and S. 555, any legislation should balance law enforcement concerns raised by commercial gaming with the understandable desire of the tribes to obtain revenue from this activity and, consistent with the interests of federalism, must pay due regard to the authority of the States to regulate activities within their borders.

Admittedly these goals are not easy to reconcile. Nevertheless, we think it is extremely important that Congress legislate in this area to clarify for both the States and the Indian tribes the extent to which reservation gaming must comport with State law. In the present situation, there is the possibility that some tribes may engage in forms of commercial gaming that have been banned completely by the State in which that tribe has its reservation, and that some tribes may open pari-mutuel horse and dog tracks in competition with those licensed by the States. This situation results in uncertainty that is of no benefit to either the tribes or the States.

Moreover, as pointed out by both the *Cabazon* opinion and by the Department of the Interior in its prepared statement for the June 18, 1987 hearing, tribal gaming operations, including bingo, that do not comply with State law may be subject to prosecution as a violation of federal law, specifically 18 U.S.C. 1955. That provision makes it an offense to conduct a gambling business "in violation of the law of a State or political subdivision in which it is conducted." The Sixth Circuit has held that a tribally licensed casino in Michigan which featured blackjack, poker and dice games violated Michigan law and 18 U.S.C. 1955. See *United States* v. *Dakota,* 796 F. 2d 186 (6th Cir. 1986). While the Department of Justice has not yet decided to employ 18 U.S.C. 1955 against tribal bingo operations that do not comply with State laws, that remains a possibility if such a course of action is necessry to halt criminal infiltration of tribal gaming. Rather than using the heavy hand of federal prosecution, however, we believe it would be preferable for Congress to make the difficult policy choices as to what forms of Indian gaming are to be exempt from federal, as well as from State, laws.

DEPARTMENT OF JUSTICE OBJECTIONS TO S. 1303

Our major objection to S. 1303 is that it allows the tribes to run casino gaming, slot machines, and lotteries free of any regard for State laws and policies banning or regulating these activities. In addition to traditional bingo, S. 1303 defines Class II gaming as "card games, . . . electronic or electromechanical facsimiles [of bingo cards], pull tabs, punch boards, tip jars, instant bingo, [and] other games similar to bingo." The inclusion of these other forms of gaming with traditional bingo is significant because subsection 10(b) provides that Class II gaming shall be within the jurisdiction

of the tribes, subject to the provisions of the Act, "where such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity and such gaming is not otherwise specifically prohibited on Indian lands by Federal law." This, in effect, greatly expands on the holding of *Cabazon* and allows tribes in any State where traditional bingo is permitted to operate not only bingo but also several other forms of gaming. Moreover, while it contemplates the adoption of some but not all State laws and regulations concerning pari-mutuel wagering, it sets out a cumbersome, difficult mechanism for applying even those State laws it adopts.

A. Casino Gaming and Slot Machines

Casino gaming in the United States typically consists of card games like blackjack and poker, craps, roulette and slot machines. S. 1303 would clearly empower the tribes to run most casino games and arguably all of them. Lumping together bingo and card games would allow the tribes to run blackjack—one of the most common casino games—and poker in a State that allowed only charitable bingo. By authorizing "electronic or electromechanical" bingo, the bill would authorize the tribes in any State that allowed charitable bingo to use slot machines even if such devices are illegal under State law. The "electronic or electromechanical" bingo provision also raises a question of consistency with another federal law, 15 U.S.C. 1175, part of the Gambling Devices Act, which presently makes it unlawful to use or possess a gambling device—defined as including slot machines and roulette wheels—in Indian country. In our view, there is no justification for carving out an exception for slot machines on which vedeo or electronic bingo is played. Finally, including within the definition of Class II gaming "other games similar to bingo" is an invitation to a tribe in any State that allows charitable bingo to run craps and other less common casino games. Arguably they are all "similar" in that they involve an element of luck. In short, S. 1303 would allow virtually all casino games with the exception of roulette, in any State that allowed bingo.

B. Lotteries

Through its inclusion of "instant bingo" in the definition of Class II gaming along with traditional bingo, S. 1303 would also allow the tribes to run lotteries in any State that authorized charitable bingo even if the State had not authorized a lottery. What is apparently contemplated by "instant bingo" is the sale of tickets, like those of the District of Columbia and other lotteries, designed so that the purchaser scratches off a portion of it to reveal a hidden number or symbol which may entitle the holder thereof to a cash prize. These tickets are traditionally sold at numerous outlets and the only thing that such lotteries have in common with bingo—which is played by a gathering of persons for a finite amount of time—is that they both involve an element of chance. In short instant bingo allows lotteries in States that have not authorized lotteries and allows unauthorized forms of lotteries in lottery States. In either case, the tribes would be allowed to ignore the public policy of a particular State.

C. Bingo and its definition

In our view, legislation should ideally limit tribal gaming to bingo although we are willing to consider an exception to this general rule. While bingo is certainly as much a target for criminal infiltration as any other cash gaming operation, limiting the tribal games to bingo at least maximizes the chances that whatever commission is established to assist the tribes in policing the games will achieve some degree of success, although as we pointed out in our prepared statement, based on the long experience of the States, there is no guarantee that even the most sophisticated structure will ensure against abuses.

Moreover, bingo should be defined to include only a game played by a gathering of persons at one location. For example, if a State allows charitable organizations to run bingo games, tribes, even though they do not meet the State definition of a charitable organization, could run bingo games without complying with State laws or regulations concerning such things as prize limits or hours of play. A tribe should not, however, be allowed to run some other type of gaming, like slot machines or lotteries by defining such games as a form of bingo. However, some tribes apparently have derived revenue from instant bingo and the virtually identical games of pull tabs, punch boards, and tip jars played during a session of regular bingo.[1] We would not necessarily oppose the inclusion of such games within the definition of Class II gaming provided they were played only during a regular session of conventional bingo. Such a restriction increases the chances that these games can be policed with some hope of success. Not to include the restriction would, in essence, permit the sale of lottery tickets at multiple locations and at all hours which would result in a set of regulatory problems quite different from those associated with regulating bingo and a few card games.

D. Pari-mutuel wagering

Pari-mutuel wagering on horse and dog racing and on jai-alai is deserving of special and separate treatment. The States typically closely regulate the conduct of these activities. Regulation takes the form not only of how the actual racing and attendant wagering shall be conducted—for example the type of medications allowed to be used on horses, types of betting allowed, etc.—but also deals with the critical questions of who shall be allowed to run a particular type of racing, where it shall be conducted, and for how many days. In our view, the Indian tribes should engage in pari-mutuel racing or jai-alai only if they comply with all State licensing requirements. Anything less will likely wreak havoc with the elaborate State regulatory schemes that have been developed for pari-mutuel wagering operations. It is important to note that few, if any, tribes are presently deriving significant revenue from pari-

[1] As Assistant Secretary of the Interior for Indian Affairs Ross O. Swimmer indicated at the June 18, 1987 hearing, we have no way of obtaining precise information about the types of games run by the various tribes or how much money they generate. Thus we are unable to hazard even a guess as to how important economically pull tabs and other forms of "instant bingo" might be, although we are aware that certain tribes have asserted their importance in the past.

mutuel wagering and no tribe has build a new pari-mutuel facility in reliance on the comparatively recent cases in which courts have found State civil/regulatory laws inapplicable to Indian tribes. The requirement that the tribes comply with State law would thus have a minimal practical impact. Moreover, while pari-mutuel wagering is certainly regulated by a number of States, thus suggesting that laws dealing with it are civil/regulatory in nature and hence not enforceable on Indian reservations by the States, the very fact that pari-mutuel wagering requires such extensive regulation is a strong argument for letting the States, which have developed expertise over the years, continue to have exclusive responsibility in this area. In short, for the Congress to authorize tribes to enter the horse racing, dog racing, and jai-alai fields without complying with all State licensing and other requirements, as does S. 1303, is to exclude unreasonably the States, the very entities with the most experience and expertise.

While S. 1303 does treat pari-mutuel wagering differently from other forms of gaming, it does so in a way that would create a nightmarishly complex scheme to administer. The basic scheme of S. 1303 is to divide gaming into three classes, Class I, Class II, and Class III. Class I gaming is defined as "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as part of or in connection with tribal ceremonies or celebrations." Class II gaming has already been discussed, and Class III gaming is defined as all gaming not included in the definition of Class I and Class II. Thus, Class III would include any casino games not already covered by the definition of Class II and, most importantly, pari-mutuel wagering.

Section 12 of the bill deals specifically with Class III gaming. Unlike Class II gaming, which requires licensing of the operation only by the tribe, Class III gaming requires the tribe to be licensed by the Commission. Before obtaining a license the tribe must have passed an ordinance similar to one required for Class II gaming in the sense that the ordinance must provide for tribal, rather than individual ownership, must provide for independent audits, must limit the uses of net revenues to certain specified purposes, and must include a number of other provisions. Before granting the license the Commission must ascertain the ability of the prospective licensee and any management contractor to comply with the provisions of the Act and of Commission rules and must determine the suitability and fitness of the management contractor to operate the establishment honestly and for the general economic benefit of the tribe. The Commission must grant the license "unless it makes a specific finding that such applicant cannot operate the gaming activity in accordance with the standards established under the Act and the gaming codes established by the Commission pursuant to this section." Thus, the Commission is extraordinarily restricted in its ability to deny a license. By way of contrast, an applicant for a casino license in Nevada has the burden of proving to the Nevada Gaming Commission that the applicant is, among other things, a person of good character, honesty, and integrity and "in all other

respects qualified to be licensed or found suitable consistently with the declared policy of the state." [2]

In any event, before the Chairman of the Commission approves a tribal ordinance for Class III gaming, he or she must first adopt "a comprehensive regulatory scheme for such gaming activity," and the regulations must be developed in consultation with tribal officials and officials of the State wherein the proposed track or other Class III operation is to be located. Moreover, the regulations are to be "identical to those provided for the same activity by the State within which such Indian gaming is to be conducted which is applicable to a State licensee subsequent to the issuance of the license, except that the Chairman shall exclude any provisions of the State's regulations which impose any tax, assessment, fee, or other financial burden upon a gaming activity and shall exclude or modify any of the State's regulations which he determines are clearly inappropriate for application to Indian tribes and their operations or which would unreasonably impair the ability of the tribe to conduct its operation." Thus, while some reference is made in S. 1303 to adopting State regulations, the exceptions allowing the Chairman to ignore State regulations are so broad that, for all practical purposes, State rules could be ignored.

For example, State laws or regulations limiting the number of racing dates would not have to be complied with since the Commission regulations only have to be identical to those of the State licensee subsequent to the issuance of the license. State taxing provisions are to be ignored, although a subsequent provision in the bill allows the Commission to assess a tribe running a Class III operation the Commission's cost in investigating, licensing, and regulating the operation to the extent that the costs do not exceed the costs incurred by the State for regulating a similar gaming operation in its jurisdiction.

More basically, section 12 of S. 1303 does not squarely deal with the question of whether a tribe in a State which has no pari-mutuel racing may open a horse track or whether a tribe in a state with pari-mutuel horse racing may open another type of pari-mutuel operation such as a dog track or jai-alai. It may be the intention of the drafters that the tribes may not engage in pari-mutuel operations other than those authorized by the State, since there would be no State regulations with which the Commission regulations would have to comport, at least to some extent, but this point should be made clear. Moreover, the thrust of section 12 is that the Commission will prepare a separate set of regulations for Class III gaming operations in each State, a prodigious task and one that would divert valuable time and attention from what should be the Commission's principal job of scrutinizing tribal Class II gaming.

We have one additional concern about S. 1303's treatment of pari-mutuel wagering based on its definition of Class I gaming. Included within the definition are "traditional forms of Indian gaming engaged in by individuals as part of or in connection with tribal ceremonies or celebrations." That would arguably allow pari-

[2] See Nevada Revised Statutes § 463.170.

mutuel wagering on horse races in connection with a tribal festival or fair if betting on horse races was a "tradition" with the tribe in question. In short, this definition of Class I gaming, which is also contained in S. 555, would arguably allow pari-mutuel gaming to be treated, at least by some tribes, as Class I, rather than Class III gaming.

In sum, we think that S. 1303 is seriously defective in its treatment of pari-mutuel wagering. We strongly urge that any Indian gaming legislation maintain the status quo in this area, clearly provide that all forms of pari-mutuel wagering in Indian country be conducted only in accordance with State laws, including State licensing requirements, and that Commission resources not be wasted in an attempt to duplicate those of the State.[3]

LAW ENFORCEMENT PROBLEMS IN S. 1303

From a law enforcement perspective, there are other aspects of S. 1303 that the Committee should consider. In general, the Commission contemplated by the bill lacks the necessary licensing authority which at least maximizes the chances that gaming can be kept free of criminal infiltration. Consequently, the type of federal control asserted over high stakes tribal gaming is generally much too weak. To have any chance to succeed the Commission must, as a minimum, be given the authority to license tribal gaming operations, not merely approve tribal licensing ordinances which allow the tribes themselves to do the actual licensing. Moreover, the Commission must have the authority to approve all key employees of a gaming establishment and all management contractors. To carry out this authority, the Commission must be given adequate time to investigate. In this connection, S. 1303 sets out a time frame that would likely prove unrealistic in many cases. It provides that the Commission must consider a proposed management contract within 120 days and any contract not acted upon in this time period shall be deemed approved. The lack of adequate authority to carry out these crucial licensing and investigative functions is the bill's greatest shortcoming in the law enforcement area. Our next biggest concern in this area is with section 18 of the bill.

A. Unreasonable restrictions on access to information in the hands of the Commission

Subsection 18(a) provides that "except as provided in subsection (b)," all information received by the Commission pursuant to the

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[3] Assuming, however, that the Committee decides not to make such a major change with respect to pari-mutuel wagering, there are other aspects of section 12 of the bill that deserve close examination. First, subsection 12(f) provides that where a State law or regulation adopted by the Commission as applicable to Class III gaming in the State involves criminal penalties for its violation, those criminal penalties are to be "enforced" by the State if the State "has the requisite criminal jurisdiction . . . pursuant to Public Law 83-280," or by "the United State pursuant to the Assimilative Crimes Act (18 U.S.C. 13)." The reference to P.L. 280 is too narrow. As the Committee knows, there are laws similar to P.L. 280 that give various other States jurisdiction over certain crimes in Indian country. See 18 U.S.C. 3243 giving Kansas jurisdiction over at least nonmajor crimes committed by or against Indians on reservations in that State; and 25 U.S.C. 232 giving New York jurisdiction over offenses committed by or against Indians in Indian country in that State. Morover, the reference to the Assimilative Crimes Act is confusing. If the intent is to assimilate State criminal law provisions it should be clearly stated that whoever violates a rule of the Commission which incorporates a State law pertaining to gaming, or a regulation promulgated pursuant to such a State law, which provides for a criminal penalty for a violation thereof, shall be guilty of a like offense and subject to a like punishment.

Act shall be preserved as "confidential pursuant to the provisions of paragraph (4) and (7) of section 552(b) of title 5," the financial information and law enforcement records exceptions to the Freedom of Information Act. (Initially, it is likely that only information such as that received from prospective management contractors and financial information concerning their gaming operations received from the tribes is intended to be so protected from public disclosure. There is no reason to afford other information received by the Commission—for example, the salaries of employees, or statistics concerning the number of minority group members employed—any greater protection than that afforded to such information in the hands of other federal agencies. Moreover, while perhaps not a matter of concern for criminal law enforcement, it appears unreasonably restrictive not to make information such as the types of gaming being operated by each tribe and an indication of the financial success or lack thereof available to the public.)

Subsection 18(b) then provides that: "The Commission *may,* when such information indicates a violation of Federal, State, or tribal criminal statutes or ordinances, provide such information to the appropriate law enforcement officials." (Emphasis added.) It is inappropriate that the Commission—a federal body—have discretion over whether to inform federal law enforcement officials of violations of federal law. The Commission should have an obligation to make such information available and subsection 18(b) should be amended to reflect that duty.

B. Unnecessary provisions with respect to the Attorney General

Subsection 18(c) is equally troublesome. It provides in the first sentence that the Attorney General is authorized to investigate activities associated with gaming authorized by the Act including but not limited to crimes in violation of 18 U.S.C. 1153 (the Major Crimes Act), 18 U.S.C. 13 (the Assimilative Crimes Act), and 18 U.S.C. 1163 (theft of tribal funds). The next sentence then provides: "The Attorney General is authorized to enforce such laws, or assist in the enforcement of such laws, upon evidence of violation as a matter of Federal law, or upon the referral of information by the Commission pursuant to subsection (b) of this section." The analysis of this subsection says only that it "reaffirms the existing power of the Attorney General to investigate and prosecute crimes on Indian reservation (sic) in connection with gaming activity." If that is all the subsection is intended to do it is unnecessary. In fact, however, the subsection may be intended to authorize the Department of Justice to investigate state and tribal law violations in connection with Indian gaming. While the Department would not be required to do so, such authority will inevitably prompt requests that the Department do so. For the Department to investigate violations of state or tribal law is unacceptable both on federalism grounds and from the standpoint of allocation of resources. We strongly urge that subsection 18(c) be deleted.

We note that section 17 in S. 555 and section 18 in S. 1303 are identical. Therefore, if S. 555 is chosen as the vehicle for Indian gaming legislation, we hope that these concerns will be addressed.

ADMINISTRATIVE LAW PROBLEMS

A. Appointment and removal of Commission members

S. 1303 raises a number of Administrative Law issues. First, it establishes an "independent commission" within the Department of the Interior. As a part of the Interior Department, the Commission is subordinate to the Secretary of the Interior and cannot be independent of his or her authority. Yet section 5(b)(5) states that the four members appointed by the Secretary can only be removed for cause. The extent of Congress' power to place limitations on the removal of subordinate executive branch officers is unclear, see *United States* v. *Perkins*, 116 U.S. 483 (1886), but in the context of this legislation such limitations should be avoided. The Secretary is responsible for the actions of the Commission's members, a majority of whom he appoints, and will be charged with defending them if they act in an illegal or controversial fashion. If S. 1303 were enacted as is, we would read the "for cause" provision broadly to give the Secretary maximum flexibility. Nevertheless, to give the Secretary the authority needed to supervise the Commission adequately, we strongly recommend that he or she be given the clear right to remove members at will. In this regard, we note that the provisions of S. 555 are somewhat better. It establishes the Commission as part of the Interior Department, rather than making it an "independent commission", and provides that a commissioner may be removed from office by the appointing authority "for neglect of duty, or malfeasance in office, or for other good cause shown."

B. Commission authority to levy fines

Section 15(a)(1) of S. 1303 permits the Chairman of the Commission to levy civil fines of up to $25,000 against a tribal gaming operator or management contractor for a violation of any provision of the Act or regulation adopted pursuant thereto. While such authority is clearly necessary, the provision in section 15(a)(1) stating that "[f]ines collected pursuant to this section shall be utilized by the Commission to defray its operating expenses" raises due process concerns. In essence, fines imposed as civil penalties would be used to supplement the Commission's funding. Although this is consistent with the concept of a self-supporting Commission which we firmly believe should be a feature of any final Indian gaming legislation, the Due Process Clause requires that such fines be assessed by a neutral tribunal. See *Ward* v. *Monroeville*, 409 U.S. 57, 62 (1972). While it is true that Commission members would not benefit personally from the money, as was the situation in the well-known old case of *Tumey* v. *Ohio*, 273 U.S. 510 (1927), the provision raises questions about how impartial the Chairman would be in levying fines when he knows that the proceeds will be applied directly to the operating expenses of the Commission. Although it is highly unlikely that anyone appointed as Chairman would ever impose an unjustified fine for purposes of raising revenue, the provision would inevitably be seized upon by a person or organization on whom the Commission imposed a fine as a means of challenging the levy.

While we cannot say definitely whether such a challenge would succeed, the issue is similar to that in *Marshall* v. *Jerrico, Inc.*, 446

U.S. 238 (1980). That case involved the power of a Department of Labor regional administrator to assess a civil penalty of up to $1000 against employers who violated child labor laws. The penalties collected in each region were returned to the national office which allocated them for various parts of the program, including the regional offices. The statute was challenged on the grounds that regional administrators would assess extra fines in the hope that some of the money would be returned to their regions. The Court rejected the challenge but highlighted several factors that are relevant in the consideration of S. 1303. First, the Court noted that the regional administrator levying the fine did not have the role of a judge, as in *Ward* and *Tumey*, but was more akin to a prosecutor since the employer on whom a fine was levied was entitled to a de novo hearing before an administrative law judge where the administrator would have to prove his case. Unlike judges, prosecutors need not be entirely neutral and detached, and the first level of adjudication, rather than accusation, was before an unbiased judge.

By contrast, under S. 1303 the Chairman and the Commission are not analagous to prosecutors in that they do not have to prove their case before an independent administrative law judge. Indeed, the Chairman's decision to levy a fine is reviewed not by an independent judge, but by the entire Commission which, in theory, is as interested in the matter as the Chairman. The next level of adjudication is in the court of appeals.[4] *Marshall* indicates that if a financially interested administrator acts as a judge, the "rigid requirements of *Tumey* and *Ward*, designed for officials performing judicial or quasi-judicial functions" would apply. *Marshall*, 446 U.S. at 248.

Another consideration in *Marshall* was the fact that the penalties collected by the regional administrators constituted less than one percent of the agency's budget, an amount so trifling that there was no realistic possibility that the administrator's "judgment would be distorted by the prospect of institutional gain as a result of zealous enforcement efforts." Id. at 250. In contrast, it is possible that the civil fines may generate much more than one percent of the Commission's operating costs, thus allowing a tribe or management contractor another argument on which to distinguish this situation from that in *Marshall.*

In short, the civil penalty provisions in S. 1303 invite judicial challenge. We think that fines should be deposited in the general fund of the Treasury rather than used as a supplement to its other funds. We note also that S. 555 contains the same language as S. 1303, namely that fines are assessed by the Chairman subject to initial adjudication before the Commission and "shall be utilized by

[4] Section 16 of S. 1303 provides that all important decisions made by the Commission shall be considered final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of title 5, United States Code. Apparently it is intended that a person aggrieved by a Commission decision have no right to further administrative review such as an appeal to an administrative law judge or to the Secretary, and that the scope and standard of review be as set out in 5 U.S.C. 706. Section 15 of S. 555 contains a similar provision. Although the Secretary may prefer not to be involved in reviewing Commission decisions concerning such things as approval of tribal gaming ordinances and management contracts, preclusion of Secretarial review as is done in section 16 of S. 1303 and section 15 of S. 555 might be invalidated by the courts as eroding the unitary executive authority required by the Constitution.

the Commission to defray its operating expenses." (S. 555, sec. 14(a)(1)).

C. Appointments clause issue with respect to off reservation gaming

Section four of S. 1303 generally prohibits tribes from running a gaming operation anywhere but within the boundaries of their present reservations. It provides that gaming regulated by the Act shall be unlawful on lands acquired in trust for the tribe after the effective date of the Act. However, the section does not apply "if the Indian tribe requesting the acquisition of such lands in trust obtains the concurrence of the governor of the State and the governing bodies of the county or municipality in which such lands are located." This provision would give individuals not appointed in accordance with the Appointments Clause, Article II, section 2, clause 2, the authority to waive a federal statute. In order to avoid the constitutional problems inherent in such a situation, section 4(b) should be revised to begin "Subject to the approval of the Secretary," a change that would ensure that implementation of this part of the statute remains in the hands of a properly appointed executive branch officer. We note that this, in essence, is the approach adopted in the comparable provision in S. 555, section 20(b)(1).

CONCLUSION

In sum, there are a number of problems with S. 1303. As we suggested at the June 18, 1987 hearing, using S. 555 as a point of departure for Indian gaming legislation is preferable. Whatever bill is chosen, we do not oppose dividing gaming into Classes I, II, and III as long as it is made clear that tribally-controlled Class I gaming does not include things like pari-mutuel racing which is properly Class III, and so long as Class II gaming is defined to include ony traditional bingo with the limited exceptions, as discussed, for concurrently played instant bingo, punch boards, and pull tabs. As for the powers of the Commission necessary to police Class III gaming, we hope to be able to discuss this matter further with the Committee staff. With respect to the basic criminal law scheme applicable to gaming in Indian country, the approach in S. 555 of assimilating all State laws pertaining to gambling but excluding from the definition of gambling Class I and Class II gaming "regulate by" the Act comes very close to the mark. For the sake of clarity, however, we would suggest that the phrase "regulated by" be deleted in favor of "conducted under a tribal ordinance approved in accordance with."

I hope that the above will be of assistance to the Committee.

Sincerely,

JOHN R. BOLTON,
Assistant Attorney General.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of Rule XXVI of the Standing Rules of the Senate, the Committee notes that, except for section 23 which codifies certain crimes in Indian country, there are no changes in existing law made by S. 555.

ADDITIONAL VIEWS OF MR. McCAIN

This is the fourth consecutive year that I have been involved in the debate regarding the issue of Federal standards and regulations for the conduct of gaming on Indian reservations and lands. It is with great reluctance that I am supporting S. 555 as reported by the Committee.

I characterize my support as reluctant because I believe a different and more favorable result for Tribes could have been achieved. Unfortunately, Tribes never banded together and offered their own gaming proposal. They also never found a consensus for supporting any particular legislative solution. Some would say that Tribes were united in calling for no gaming legislation, but such a position ignores the whole debate, and, more importantly, it provides no support to those Members of Congress who have attempted to craft legislation which would be sensitive to tribal concerns. The issue has never been: should there be federal regulation of Indian gaming? Four years of continuous debate on Indian gaming should lead even the most casual observer of the legislative process to realize that legislation was inevitable. The focus of debate has always been on what standards and regulations should govern the conduct of gaming on Indian reservations and lands.

As a participant in the debate, I offered S. 1303 the companion to H.R. 2507 as introduced by Congressman Udall. This bill would have allowed Tribes to continue gaming activities that are consistent with current law under Federal regulations and standards, without State intrusion, while ensuring that adequate safeguards and careful monitoring are maintained to prevent criminal activity as called for by States. Unfortunately, I received no more than a handful of letters supporting this measure; only more calls for "no legislation". I believe Tribes and tribal organizations share part of the burden for the direction that Indian gaming legislation has taken.

As the debate unfolded, it became clear that the interests of the states and of the gaming industry extended far beyond their expressed concern about organized crime. Their true interest was protection of their own games from a new source of economic competition. Never mind the fact that tribes have used gaming revenues, and S. 1303 would have restricted their use, to support tribal governmental functions as well as addressing the health, education, social and economic needs of their members. Never mind the fact that in 15 years of gaming activity on Indian reservations there has never been one clearly proven case of organized criminal activity. In spite of these and other reasons, the State and gaming industry have always come to the table with the position that what is theirs is theirs and what the Tribe have is negotiable.

The debate now focuses on S. 555, as amended. The Committee Report is clear as to the purpose of Tribal/State compacts as called

for in Section 11(d). I understand Senator Evans' concerns regarding the potential overextension of the intended scope of the Tribal/State compact approach. Toward this end, I believe it is important to again underscore the statement that appears on page 10 of the Report: "The Committee does not intend to authorize any wholesale transfer of jurisdiction from a tribe to a state." From time immemorial, Tribes have been and will continue to be permanent governmental bodies exercising those basic powers of government, as do Federal and State governments, to fulfill the needs of their members. Under our constitutional system of government, the right of Tribes to be self-governing and to share in our federal system must not be diminished.

Finally, some Members of Congress, including myself, have stated that they would rather see Tribes involved in other revenue raising activities. We must ask ourselves, however, if we have provided Tribes with sufficient opportunities to generate non-gaming revenues and thereby allow Tribes to increase their economic self-sufficiency. The answer is a resounding no. We have not done enough. Once this gaming debate is over, I challenge those involved in this debate to devote their energies toward increasing long-term economic development opportunities for Indian Tribes.

JOHN MCCAIN.

ADDITIONAL VIEWS OF MR. EVANS

I voted in Committee to report this bill to the full Senate, but I did so with great reluctance. I am troubled by the potential implications S. 555 may have for the fundamental legal relationship between the United States and the several Indian tribes and on the established principles of Federal Indian Law which guide that relationship. S. 555, the Indian Gaming Regulatory Act, should not be construed as a departure from established principles of the legal relationship between the tribes and the United States. Instead, the bill should be considered within the line of developed case law extending over a century and a half by the United States Supreme Court, including the basic principles set forth in *California* v. *Cabazon Band of Mission Indians.*

The bill's statement of purpose is generally a sound analysis of the law as it applies to jurisdiction in Indian Country pursuant to Public Law 83-280, specifically as established by the Court in *Seminole Tribe* v. *Butterworth* and *Cabazon.* In light of the Committee statement I am confident that the Federal courts will interpret S. 555 in the proper jurisdictional context. Nevertheless, I believe it is necessary to underscore an important distinction between this bill and Public Law 83-280. Under Public 83-280, the courts distinguish between a State's criminal laws which are prohibitory in nature and its civil laws which are regulatory in nature. This distinction is used to determine the extent to which State laws apply through the assertion of State court jurisdiction on Indian lands in Public Law 280 states. Under S. 555, application of the prohibitory/regulatory distinction is markedly different from the application of the distinction in the context of Public Law 83-280. Here, the courts will consider the distinction between a State's civil and criminal laws to determine whether a body of law is applicable, as a matter of federal law, to prohibit Class II games. S. 555 should not be interpreted in any way to subject Indian tribes or their members who engage in Class II games to the criminal jurisdiction of States in which criminal laws prohibit Class II games.

S. 555 should not be interpreted as going beyond Public Law 83-280 in another respect. Public Law 83-280 transferred to the States jurisdiction over criminal and civil causes of action in Indian Country. In other words Public Law 280 only subjected the actions of individual Indians to State enforcement. Public Law 83-280 did not subject the governing processes of the tribes to State law and public policy constraints, which would be a fundamental derogation of tribal self-government. Likewise, S. 555 should be construed not to subject tribal governance to State court jurisdiction.

Section 10 purports to delegate the Secretary's trust responsibility to the Gaming Commission. I am troubled to think that this section of the Act and the accompanying report language may be read to suggest that the Secretary's charge to carry out the United

States' trust responsibility ends where that of the Commission begins. The entire Federal Government owes a trust obligation to the tribes and the Secretary is still charged with carrying out that overall responsibility, especially in areas only incidentally affected by gaming and S. 555 in Indian Country. The Act should not be construed to relieve the Secretary, or any other Federal officer, of trust obligations to the tribes.

Finally, this bill should be construed as an explicit preemption of the field of gaming in Indian Country. Thus, in accordance the fundamental legal principles upon which the Supreme Court relied in deciding *Cabazon,* where the Federal Government has preempted a field affecting Indians or Indian tribes, there should be no balancing of State public policy and interests when they conflict with tribal rights except where expressly provided in this bill. It is my understanding that S. 555 acknowledges that inherent rights are expressly reserved to the tribes. This bill allows tribes to relinguish some of those rights by way of compacts with the States, in accordance with the Federal Government's trust obligation to the tribes. This bill should not be construed, however, to require tribes to unilaterally relinguish any other rights, powers, or authority.

We should be candid about gambling. This issue is not one of crime control, morality, or economic fairness. Lotteries and other forms of gambling abound in many States, charities, and church organizations nationwide. It would be hypocritical indeed to impose on Indian people more stringent moral standards than those by which the rest of our citizenry chooses to live. Moreover, Indian tribes may have a competitive economic advantage because, rightly or wrongly, many states have chosen not to allow the same types of gaming in which tribes are empowered to engage. Ironically, the strongest opponents of tribal authority over gaming on Indian lands are from States whose liberal gaming policies would allow them to compete on an equal basis with the tribes.

I am no more fond of gambling than any other member of this Committee and no less aware of the potential dangers of organized criminal infiltration of Indian gaming. In 15 years of commercial gaming on Indian reservations, however, tribes have proven more capable of controlling this potential problem than have States in which high stakes gambling is played. Given this fact, the bill should not be construed, either inside or outside the field of gaming, as a derogation of the tribes' right to govern themselves and to attain economic self-sufficiency.

DANIEL J. EVANS.

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